Case No.: 200,568-3

SUPREME COURT OF THE STATE OF WASHINGTON

In re Stephen K. Eugster,

Attorney at Law

WSBA No. 2003

REPLY BRIEF OF APPELLANT

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I. Introduction

The Bar's case boils down to this: Eugster should be disbarred because he filed a "baseless" guardianship action "against" Marion Stead for his own financial gain in violation of the RPCs and CR 11. That is legally, procedurally and factually wrong.

II. Legal Standard

To depart from Washington State Bar Association (WSBA) Disciplinary Board's sanction recommendations in attorney disciplinary proceeding, the Supreme Court must be persuaded that the recommended sanctions are inappropriate based upon consideration of the following factors:

(1) Purposes of attorney discipline, i.e., sanction must protect public and deter other attorneys from similar misconduct;

(2) Proportionality of sanction to misconduct, i.e., sanction must not depart significantly from sanctions imposed in similar cases;

(3) Effect of sanction on attorney, i.e., sanction must not be clearly excessive;

(4) Record developed by hearing panel, i.e., sanction must be fairly supported by record and must not be based upon considerations not supported by record; and

(5) Extent of agreement among Board members, i.e., sanction supported by unanimous recommendation will not be rejected in absence of clear reasons.[1]

III. Summary Reply

Without repeating the arguments made in the Opening Brief, the Bar's recommendation is inappropriate because:

(1) Disbarring Eugster after 38 years of practice without any prior disciplinary history for the single act of filing a guardianship for the benefit of a client or former client defies logic and actually harms the public by deterring other attorneys from exercising their

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[1] In re Disciplinary Proceeding Against McKean, 148 Wn.2d 849, 64 P.3d 1226 (2003)

statutory rights to file guardianships for the protection of vulnerable adults.

(2) Disbarring Eugster after 38 years of practice without any prior disciplinary history for the single act of filing a guardianship for the benefit of a client or former client is disproportionate to sanctions imposed on others. [2]

(3) Disbarring Eugster after 38 years of practice without any prior disciplinary history for the single act of filing a guardianship for the benefit of a client or former client would clearly be excessive.[3]

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[2]See, e.g., In re Disciplinary Proceeding against Trejo, Supreme Court No. 200,477-6 (June 12, 2008) the Court imposed a three month suspension followed by two years of probation against an attorney based on a "pattern of misconduct" involving inappropriate handling of client funds. The attorney had previously been disciplined twice resulting in an admonishment and a reprimand for the same misconduct. See, also, cases cited and discussion at Opening Brief at pgs. 39-41

[3]The fact that this Court denied the Bar's Petition for Interim Suspension supports Eugster's contention that his continued practice of law does not harm the integrity of the bar. In re: Stephen Eugster, Attorney at Law, No. 200,566-7

(4) Disbarring Eugster after 38 years of practice without any prior disciplinary history for the single act of filing a guardianship for the benefit of a client or former client based on claims he "engaged in multiple acts of misconduct for his own financial purposes" is not supported by the confusing and erroneous record[4]; and

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[4]Although "[u]nchallenged findings of fact are treated as verities on appeal," in this case the Bar's own Answer highlights numerous errors with the Hearing Officer's findings. [See e.g. Answer at fns. 1, 3, 4, 5, 13, 14, and 19]. In re Disciplinary Proceeding against Marshall, 160 Wn.2d 317, 330, 157 P.3d 859 (2007). The Bar claims that these errors were minor or fixed by the board. That is not the case. For example, the Hearing Officer attributed the prior Hellenthal estate plan to Eugster. FOF 2.13. CP 19:9 ["In 2003, the Stead's had been advised by an accountant to review their estate planning. Subsequently, Roger took the Stead's to Spokane and Respondent prepared new documents, including supplemental needs trusts, were executed."] The Bar's Answer alters that FOF and glosses over this error by stating that "In 2003, Roger took his mother, Marion, and stepfather, John Stead (John), to a lawyer for estate planning purposes." Answer at 3 [emphasis added]. That lawyer was not Eugster but Attorney David Hellenthal. Ex. 2-3.

(5) While the Board unanimously agreed on the recommendation to disbar Eugster, it should be rejected for several specific reasons.

> (a) The Bar failed to charge him with violating the applicable rule [RPC 1.13]. Consequently, the Hearing Officer applied the wrong rule.[5]
>
> (b) Both the Bar and Hearing Office ignored state guardianship law which grants those who file guardianships qualified immunity.[6]
>
> (c) The hearing officer's decision to find that Eugster violated CR 11 – *when that was not raised or found by the trial court and given the qualified immunity granted to those filing guardianship actions* – was *ultra varies*.
>
> (d) Eugster has practiced for 38 years without any prior disciplinary history.

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[5] "The former RPC apply because Eugster's conduct preceded the adoption of the current RPC in September 2006." Answer at 17 (fn. 11). See also Opening Brief at 26-27.

[6] "Any person or entity may petition for the appointment of a qualified person, trust company, national bank, or nonprofit corporation authorized in RCW 11.88.020 as the guardian or limited guardian of an incapacitated person. No liability for filing a petition for guardianship or limited guardianship shall attach to a petitioner acting in good faith and upon reasonable basis." RCW 11.88.030 (1) [Emphasis added]

IV. Argument

A. The Bar ignores RPC 1.13.

There is no finding that Eugster violated or did not act reasonably under RPC 1.13. The bar complaint failed to cite RPC 1.13. The hearing officer failed to apply RPC 1.13. The hearing officer applied the wrong RPC[7], the "new" RPC 1.14 and/or CR 11 "reasonable inquiry" analysis rather than RPC 1.13's "reasonable belief" analysis. The Bar's Answer claims that "RPC 1.13 does not apply to Eugster's conduct because he did not 'reasonably believe' that Marion could not act in her own best interest."[8] The Bar's Answer continues this fatal omission by failing to list RPC 1.13 among the "applicable former RPCs" germane to this case.[9]

The Bar explains this fundamental error by arguing that the pivotal issue remains the same, that being Eugster's state of mind,

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[7]The Bar concedes that the Hearing Officer's Findings erroneously refer to RPC 1.16. See Answer at 31 (fn 14).
[8]Answer at 19.
[9]See Bar's Answer at Appendix 4

what he reasonably believed. The Bar argues that there is no objective evidence of Marion's declining competency. Yet the Hearing Officer opined that:

> Respondent Eugster should have known that Ms. Stead was suffering from grief and depression from the loss of her husband and the estrangement of her son, and not attributed those emotions to incompetency. At one point in this hearing testimony, Respondent alluded to Ms. Stead's loss of John and moving into the new home in the same sentence as he used the term confused. He failed utterly to consider the effects of grief and depression on Ms. Stead, while testifying that during that summer he was going through a sad time because he was in the midst of a divorce.[10]

The Bar ignores Eugster's 34 years[11] of private practice specializing in elder law; his long history with this particular client

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[10]FOF 2.41 CP 46

[11]TR 762 [Eugster was admitted to practice on January 2, 1970 and the events at issue occurred in 2004]; see generally State v. Israel, 19 Wn. App. 773, 779, 577 P.2d 631 (1978) (acknowledging counsel's dual role as representative of client and officer of the court, and holding that counsel's opinion about competency is entitled to weight).

and her family;[12] the death of Marion's husband followed by relocation to a nursing home; her increasingly erratic and conflicting demands;[13] her diagnosed anxiety and increasing paranoia with respect to her only son[14] and only granddaughter;[15] her abrupt decision to hire a for-profit guardianship company;[16] and changes in her and her husband's long term estate plan

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[12] FOF 2.13 States that Mr. and Mrs. Stead originally hired Eugster to prepare estate planning documents in 1997.

[13] Ex. 30 [Letter to Marion from Eugster dated August 13, 2004 RE: Estate] "You cannot change John's Will."

[14] Marion was troubled about being in an assisted living facility (Parkview). She was dismayed that her only son, Roger Samuels, had not been visiting her enough and that he might be going to Europe in the next few days without visiting her before doing so. TR 410. According to Roger, "*I thought my mother had flipped* ... I realized she was under extreme emotional pressure. John was visibly wasting away, and she was extremely agitated about his condition, and that's why she was in such a near hysterical state." Hearing TR 259:8-12 [Emphasis added]. According to the GAL Report, "In the event that the Court were to appoint a guardian, it would be my recommendation that it not be Mr. Samuels." Ex. 88 at 20: 9-10.

[15] Ex. 82

[16] Northwest Trustee & Management Services

inconsistent with what had been in place for decades.[17] As her only son, Roger Samuels, stated at the guardianship hearing:

> My daughter, her only granddaughter, grandchild and I simply want to have her back and protect her and care for her. *She's lost.* And I don't want anyone, including Mr. Braff, to have anything to do with our family. This is a family crisis and it's horrible that we are standing here in court.[18]

B. The Bar ignores the guardianship law.

The Bar argues that Eugster is not entitled to "qualified immunity merely because he asserts that he acted pursuant to RPC 1.13." The Bar disingenuously claims that "Eugster could not seek a guardianship under RPC 1.13(b)."

RPC 1.13(b) provides that "a lawyer may seek the appointment of a guardian or take other protective action with

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[17] According to the GAL Report, Marion stated that the purpose of her and her husband's move to Colville from Philadelphia "was to be closer to her granddaughter Emilie Sammons." Ex. 88 at 3:17-18].

[18] Ex. 64 [TR at 3:13-18] (Emphasis added). It is important to note that, unlike Samuels, Eugster did not oppose Mr. Braff's appointment.

respect to a client." State guardianship law clearly grants qualified immunity to anyone filing a petition for guardianship.[19] The Bar wants the court to legislate from the bench and carve an exception to the guardianship statute that says lawyers who petition for a guardianship that is not granted should expect to face sanctions.

The Bar argues that Eugster should have consulted with Marion and consulted with additional people before petitioning for the guardianship. Eugster relied on his decades of experience as an elder law attorney and his long term friendship with Marion.

The Bar never interviewed Marion before or after the complaint was filed by Burke against Eugster. The Bar never talked to her![20] According to the letter from Disciplinary Counsel to Mr. Braff dated December 28, 2005 regarding his grievance against Eugster,

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[19] RCW 11.88.020.

[20] Refer to Burke's letter telling Eugster he was going to recommend to the Review Board that a complaint be filed.

> We have completed our investigation and write to advise you of our conclusions before we report this matter to a Review Committee of the Disciplinary Board. Our analysis is based on interviews of Andrew Braff, Cynthia Larson, Roger Samuels, James Woodward, Judge Allen Nielson, a review of the recordings of the hearings on October 19, 2004 and November 8, 2004, and a review of the documentation listed at the end of this letter.[21]

Marion did not pass away until November, 2006.

What is relevant is what Eugster knew at the time. The Bar has put itself as the arbiter of competency with the benefit of perfect hindsight.

C. The Hearings Officer's CR 11 finding is *ultra vires*.[22]

Litigation ethics rules (such as RPC 3.4) have generally been separated from Civil Rule 11.[23] It was improper and

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[21] CP 508 [Exhibit 129 to Eugster's Answer].

[22] See Hearing Officer's FOF and COL at 16-17 [CP 45-46]

[23] Richard G. Johnson, *Integrating Legal Ethics and Professional Responsibility with Federal Rule of Civil Procedure 11*, 37 Loy. L. A. L. Rev. 819, 899 (2003-2004).

inconsistent with caselaw for the hearing officer to use litigation ethics rules as the CR 11 standard.[24]

The Bar's argument defends this *ultra vires* act by arguing that the hearing officer was acting under the authority of the Supreme Court and, therefore, could find a violation of CR 11. [25] But the Hearing Officer is not and was not the judge presiding in the case at issue. The trial court was not asked and did not question the good faith or reasonable basis Eugster had for filing the guardianship. In fact, neither Marion nor her counsel, Mr. Braff, challenged Eugster's motives at trial. The Court did not find the filing was frivolous or a violation of CR 11.

> While Rule 11 sanctions may also flow from the attorney's ethical violations, it is a separate legal consequence of the misconduct. A trial court has no more authority to disbar, suspend or publicly censure an attorney for an infraction committed before it in a

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[24] *Id.*, at 891 ["All that we know for a fact from the above review is that the litigation ethics rules have not been used as the Civil Rule 11 standard in over ninety-nine percent of the Civil Rule 11 cases."]

[25] Answer at 45

> legal proceeding than it does to absolve that attorney of a charge of an ethical violation in the same proceeding.[26]

Conversely, a hearings officer has no more authority to sanction an attorney for CR 11 where, unlike the trial judge, the hearing officer did not hear the case. Here, the hearing officer found that Eugster violated CR 11 by petitioning the court for a guardianship. The hearing officer simply does not have jurisdiction to make such a finding. Her job is to determine violations of the RPCs, not to find violations of civil rules of procedure and then use them to bootstrap to a rule violation--it's just all backwards.

D. The Bar's claim that "Eugster engaged in multiple acts of misconduct for his own financial purposes" is unsupported by substantial evidence.

The Court has applied the aggravating factor of dishonest or selfish motives in cases where the "lawyer intends to benefit

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[26] In re Discipline of Eicher, 661 N.W.2d 354 (2003).

financially or deceive the court."[27] Where is the proof that Eugster intended to "benefit financially or deceive the court" by filing a guardianship action with the court nominating someone else as guardian of Marion's person, estate and finances?[28] The Bar argues "If successful, the guardianship would have *installed* Eugster as trustee over Marion's assets and as her attorney in fact."[29] The guardianship petition says nothing about *installing* Eugster as trustee over Marion's assets. Moreover, Eugster wrote Marion on August 13, 2004, *wanting out* stating:

> In all honesty, though, I think you should go over your affairs once more with me – so as to be sure your Trust and will are as you would like them, that your Powers of Attorney are as you want them, and that your other affairs are as you want them. But, I think you should give serious thought to making Roger the

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[27] In re Disciplinary Proceeding against Trejo, Supreme Court No. 200,477-6 (June 12, 2008) [citing In re Disciplinary Proceeding Against Holcomb, 162 Wn.2d 563, 587, 173 P.3d 898 (2007)].
[28] Ex. 47
[29] Answer at 2 [Emphasis Added].

successor trustee to your Trust and the person holding your power of attorney.[30]

If Eugster wanted to benefit financially from Marion, why send that letter?

Why petition the court for a guardianship naming Roger as the proposed guardian?

Why not maintain the status quo, capitalize on Marion's paranoia about her son, solicit loans[31] from Marion and/or charge thousands of dollars per month like the professional trustee?

How could Eugster benefit from the living trust and power of attorney with a guardianship by someone else over her financial affairs and subject to court supervision?

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[30]Letter from Eugster to Stead [August 13, 2004] CP 346-348 [Emphasis added].

[31]An attorney who solicits loans from a client because he is unable to find funding elsewhere acts selfishly because the attorney seeks to benefit directly from the client. In re Disciplinary Proceeding against Trejo, Supreme Court No. 200,477-6 (June 12, 2008) [citing In re Disciplinary Proceeding Against Holcomb, 162 Wn.2d 563, 587, 173 P.3d 898 (2007)].

The Hearing Officer's conclusion is unsupported by the convoluted record , contradicted by common sense and contrary to fundamental the law of parsimony.[32] For example, the hearing officer could not reconcile why Marion would agree to keep her son on as alternative trustee if she wanted him out of her financial affairs.[33] As stated in the FOF 2.21, "Ms. Stead did not testify during this proceeding, so why she would agree to have Roger as successor remains a mystery."[34]

Could it be that is what Marion actually wanted?

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[32]Also known as Occam's razor. The principle that the explanation of any phenomenon should make as few assumptions as possible. This is often paraphrased as "All other things being equal, the simplest explanation is the best."

[33]"The reason that Roger was named as a successor is unknown." Answer at 7 [citing FOF 2.21 at 6]. According to the Bar's theory, Marion must have been incompetent or acting under duress to name her son as successor because it conflicts with the Bar's story line that Eugster was out to take this elderly widow's money.

[34]*Id.* Although Marion passed away before the hearing, the Bar began its investigation in January 2005 but for unexplained reasons never interviewed Marion. Eugster maintains that his due process rights to confrontation were violated if hearsay from a dead person is allowed. See Brief of Respondent at 27-30.

Could it be that all Eugster was to do, all Marion wanted him to do, was put himself before Roger for the time being so as to check things out?

Could it be that the Hearings Officer got it completely wrong when she concluded that "Ms. Stead did not want Roger to have anything to do with her property or her finances?" [35]

Ironically, the hearing officer later agreed that it would be "prudent" for the son to contest Marion's will.[36] Why, if she was fully competent? Or was it a suggestion that her last will might have been the product of undue influence? If so, by whom? Certainly not Eugster.

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[35] Order Adopting Hearing Officer's Decision: FOF 2.24 [CP 12]

[36] "The association elicited testimony that Roger is now contesting the will his mother signed two days before her death. Given the size of the estate, Roger's resources, his daughter's interests, and the fact that because of the action of Respondent Eugster, he had had no contact with his mother for two years prior to her death, *this seems to be a prudent action to protect his daughter.*" Findings of Fact, Conclusions of Law Hearing Officer's Recommendations at 30-31 [CP 59-60] [Emphasis added].

V. Conclusion

During oral argument on the Bar's Motion to Show Cause,[37] Justice Charles Johnson asked a question to Disciplinary Counsel that summed up the central issue in this case:

> I've had some experience in this field. In my practice, say I represented a client for 15 years in their estate planning and every document I've drafted was consistent as to the bounty or the heir until the son or daughter places the client in the nursing home at which point the client becomes a little more paranoid[38] and believes the daughter or son wants to steal all of their money. And all of a sudden XYZ guardianship for-profit company comes in and you get a letter stating your services are terminated and find out there is a new estate plan drafted inconsistent with what has gone on for 20 years. Under RPC 1.13 what is my or the attorney's responsibility if you reasonably believe the client is being victimized based

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[37] In Re: Stephen Eugster, Attorney at Law: No. 200,566-7

[38] According to the GAL Report, Marion "believes that her son took the original Wills made up by Mr. Eugster and destroyed them" in order to get her and her husband to see attorney David Hellenthal regarding estate planning. Ex. 88 at 3:28-29. "She also reported that he began taking money out of accounts which the Steads maintained at Edward Jones in Colville." Id., at 4:20-21

> upon a mental disintegration. Is there any duty to the former client once you get that letter?[39]

The answer has to be YES! Lawyers have continuing obligations to clients and special responsibilities to take protective action on behalf of vulnerable adults and others. RPC 1.13 provides that

> When the lawyer reasonable believes that the client cannot adequately act in the client's own interest, a lawyer may seek the appointment of a guardian or take other protective action with respect to a client.

Eugster took "protective action" under RPC 1.13 and petitioned the court for a guardianship for Marion Stead's benefit. The law encourages guardianships by granting petitioners qualified immunity.[40]

To sanction Eugster would chill other attorneys who may feel their client or former client is being taken advantage of. Why risk discipline based on whether or not the vulnerable adult is

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[39] Transcribed by counsel from TVW video of hearing at 4:40: http://www.tvw.org/media/mediaplayer.cfm?evid=2008050065C&TYPE=V&CFID=5838709&CFTOKEN=d212764dead3f7af-7882CB45-3048-349E-4E26583170DCDAA3&bhcp=1

[40] RCW 11.88.020

found incompetent? Such a result would be contrary to the primary purposes of attorney discipline, i.e., protect the public and deter other attorneys from similar misconduct.

WSBA as Attachment to Email

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